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No. 802

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

E. L. FARMER & COMPANY, a Corporation, *Petitioner*

v.

MARSHALL W. HOOKS and AMERICAN MOTORISTS INSURANCE COMPANY, a Corporation, *Respondents*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND APPENDIX

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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*To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Petitioner, E. L. Farmer & Company, prays that a Writ of Certiorari issue to review the erroneous decision and judgment of the United States Court of Appeals for the Tenth Circuit entered below on November 26, 1956.

## THE OPINION BELOW

The District Court filed no opinion below. The opinion of the United States Court of Appeals for the Tenth Circuit is printed in the Appendix hereto, infra, pages 1a-10a, and is reported in 239 F. 2d 547.

## JURISDICTION

The decision and judgment of the Court of Appeals were entered on November 26, 1956 (App. pp. 1a, 11a).[1] A timely Petition for Rehearing (R. 246)[2] was denied by the court below on December 31, 1956 (App. 11a). The mandate of the court below has been stayed until February 26, 1957. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

## QUESTION PRESENTED

1. Whether the District Court and the Court of Appeals properly and correctly applied the substantive and controlling law of the State of Texas, where the accident in this case occurred

## STATUTE INVOLVED

The statute involved in this case, which the decisions below contravene, is the Rules of Decision Act, 28 U.S.C., Section 1652, reading as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress require or provide, shall be regarded as rules, of decision in civil actions in the Courts of the United States, in cases where they apply."

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[1] App. refers to the Appendix printed at the end of this petition.

[2] R. refers to the printed transcript or record filed herewith.

## STATEMENT

Respondent, Marshall W. Hooks, brought an action for personal injuries which he alleged he sustained when a platform fell on him. Prior to instituting this civil action, respondent Hooks had sought compensation and medical expenses and had obtained them under the Workmen's Compensation Laws for the State of Texas and obtained maximum compensation payments and all of his medical expenses. Accordingly, the insurance carrier of respondent Hook's employer, respondent American Motorists Insurance Company, was a party in the action to recover the full compensation payments and all medical expenses this insurance company was obligated to pay in exchange for the premiums Kerr-McGee paid to cover its employees. (R. 6-7).

Petitioner denied negligence in the temporary placement of the platform and alleged petitioner breached no duty owing respondent Hooks, who was at most a licensee, and that respondent Hooks in crawling under the platform to eat his lunch proximately caused the accident of which he complained and, in so doing, thus made a voluntary choice and assumed the risk of possible injury while squatting under the platform (R. 7-11).

The case was tried twice to a jury in the United States District Court for the Western District of Oklahoma (R. 11, 21, 37) and the evidence established the following facts in the second trial:

Petitioner contracted with Kerr-McGee to hoist oil field equipment from mud tanks near the well site, in Texas, and move it out of the way until needed in the assembly of the rig, when petitioner would haul

it back (R. 48, 108, 114). Kerr-McGee had cleared an area surrounding the well location approximately 150 feet square with a bulldozer (R. 40, 47). Petitioner's employees stored the heavy equipment in the rough areas at the edge of the clearing (R. 41-43). Between 8:30 and 9:30 A.M. on the day of the accident, petitioner's employees, with a gin pole truck, moved the platform, or monkey board as it was called, from the mud tank to a location 200 feet away at the edge of the bulldozed area (R. 47, 76, 76, 107, 114, 119) and the monkey board was placed against a mesquite tree approximately 12 to 15 feet in height, with the long side of the 8 x 10 foot platform resting on the ground at a 45 degree angle. The board rested against the tree approximately 2 feet off center. It weighed from 800 to 1600 pounds. (R. 55, 56, 69, 109, 115, 117, 127). As placed it could be openly seen and was obvious to all persons on the well location (R. 75, 76, 109, 116).

The board was leaned against the tree for the convenience of petitioner's employees in the performance of their work. They planned to return when the monkey board was needed and attach a winch line to the board in order to assemble the board into the rig (R. 118, 121). The board was only temporarily placed against the tree and it looked safe to the truck driver who placed it there (R. 120). When the board was in position against the tree, petitioner's swamper, who was assisting the driver in moving the board (a man weighing from 180 to 190 pounds) jumped upon the board and unfastened it (R. 116). It stayed firm against the tree. (R. 120)

Respondent Hooks, who was 45 years of age at the time of the accident, had worked as a roughneck in oil fields for four years. Kerr-McGee hired him the

day before the accident. Hooks saw the well location that day. (R. 52, 53, 60) He reported for work the following day at 9:30 A.M. and worked through the morning at the well substructure, during which time the monkey board rested firmly against the mesquite tree. (R. 54) When Kerr-McGee's superintendent called a break for lunch about noon, respondent Hooks, unlike the rest of the men working on the substructure, who ate their lunches under the substructure at the well site where it was shady (R. 67, 113, 132), decided he would eat his lunch in the shade of the mesquite tree and under the monkey board (R. 55, 64, 66). He had observed the board against the tree as he went to his automobile to get his lunch kit (R. 55, 64), had noticed that the tree and board furnished some shade and that the board was leaning against the tree at a 45 degree angle (R. 55-56). Respondent Hooks testified he did not know "for sure" whether he sat under the monkey board but obviously he must have because the board slid down the tree and struck his back (R. 57). Instead of eating his lunch in his automobile or at the substructure, he crawled under the board to eat and testified that he could touch both the tree and the board from where he was sitting (R. 56-57). Almost immediately after Hooks sat down under the board to eat his lunch, the board skidded down the tree, fell upon his back and injured him (R. 57, 58, 65, 70). Thus, Hooks testified, before the board struck him he heard a pop, and *as he leaned forward to raise up* the board struck him on his back (R. 57, 58). He testified further, "it didn't enter his mind whether it (the board) was safe or not because I didn't intend to do anything to it. I wasn't going to bother it myself, *to start with.*" He testified the board looked substantial (R. 60). We pause to point out that this board

rested against the mesquite tree from 8:30 A.M. until noon, that another man of about 190 pounds in weight jumped on it to unhook the line, yet it did not move. Yet, respondent Hooks, who crawled under it and who could touch both the board and the tree, said he did not touch either! This taxes credulity. There is only one logical answer to the cause of this accident. Hooks either touched and moved the board or the tree. There is no other cause for this accident, and we say no reasonable man can read this record objectively and come to any other honest conclusion.

The undisputed evidence was all to the same effect and showed that none of Kerr-McGee's employees had any reason to place themselves near or under the monkey board leaning on the tree in the normal performance of their work (R. 72, 113, 125, 132).

The trial court refused petitioner's requested instructions that respondent Hooks, as he was not an employee of petitioner, was at most when he crawled under the monkey board for his own personal reason, that is, to eat his lunch in the shade there, a licensee to whom petitioner owed only the duty not to wilfully and wantonly injure him. The trial court refused to define "assumption of risk" as that term was defined by the law of Texas, where the accident occurred, as charging respondent Hooks not only with a known or obvious dangers, but also with those which he might have known of in the exercise of ordinary care (R. 12-20). Instead, the trial court instructed the jury to measure petitioner's conduct by the standard of the ordinary prudent person in the placement of the board! That court erroneously instructed the jury that if the defendant under such a standard of care could have anticipated that in the mere placing of the board

against the tree workmen working around the well site *might* get hurt, such placement constituted negligence and required a verdict for respondent Hooks. (R. 139) The trial court erroneously charged the jury, contrary to the controlling law of Texas on the assumption of risk, as follows (R. 140):

> "Thus, in the instant case *if the plaintiff knew that a dangerous condition existed* due to the manner in which the monkey board was resting against the instant tree; *and, with full knowledge of such apparent danger voluntarily placed himself in a position of peril* and as a consequence was injured, plaintiff cannot recover from the defendant. However, *if plaintiff was not apprised of the dangerous condition or the presence of hazard,* then the plaintiff, by sitting near the tree in question *cannot be deemed to have assumed the risk.*" (Emphasis added)

Petitioner objected to this charge because it limited the assumption of risk to situations where a defendant *knew* that a dangerous condition existed, whereas under the law of Texas the jury should have been instructed that term included dangerous conditions which a defendant *"should have known"* as well as those of which he had full knowledge (R. 143, 144). The trial court refused to thus correct its charge (R. 144).

The jury returned a "quotient" verdict for respondent Hooks in the amount of $105,039.43 against petitioner, and in favor of respondent, American Motorists Insurance Company, Kerr-Magee's compensation insurance carrier, in the amount of $16,552.27, representing compensation and medical expenses paid by said company to and for respondent Hooks, against

petitioner. (R. 29) The District Court entered a judgment on the verdict (R. 20-21).

Petitioner's motions for a directed verdict, for judgment n.o.v. and for a new trial were denied (R. 22, 33, 104).

Petitioner appealed to the United States Court of Appeals for the Tenth Circuit. It affirmed on November 26, 1956 (App. 11a) and denied petitioner's request for a rehearing on December 31, 1956 (App. 11a). The mandate of the court below has been stayed until February 26, 1957.

## REASONS FOR GRANTING THE WRIT

Several of the grounds usually considered by this Court as a basis for certiorari are present in this case. Both the District Court and the Court of Appeals have flatly refused to follow the substantive and controlling law of the State of Texas as required by *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 and the many decisions of this Honorable Court following it. In addition, there is a direct conflict in the construction of the law of Texas insofar as that law applies to the facts in this case between the Tenth Circuit in its decision in *Swift & Co.* v. *Schuster,* 192 F. 2d 615, the decision below which is similar to the *Swift & Co.* decision, and the decisions of the Fifth Circuit construing Texas law in *Bagby* v. *Barton,* 131 F. 2d 887 and *U. S. Gypsum Company* v. *Balfanz,* 193 F. 2d 1. This confusing situation calls for the prompt exercise of this Court's powers of supervision and correction in order to secure for citizens in the Tenth Circuit the adjudication of their civil actions in accordance with controlling law (i.e., State law) as required by the *Erie R. Co.* case

and cases following it and the terse provisions of 28 U.S.C., Section 1652.

## I.

**The decision of the Court of Appeals is not in accord with and is "opposite" and contrary to the controlling law of Texas.**

The Court of Appeals admitted in its opinion that the tree against which the monkey board rested was 100 to 200 feet from the well site. That court further stated that it was between 8:30 and 9:30 in the morning when petitioner's employees unloaded the platform and leaned it against the mesquite tree, with the long side resting on the ground at an angle of 45 degrees and approximately 2 feet off center. The Court of Appeals further stated, when it was placed in that position an employee of petitioner weighing some 190 pounds jumped upon it and unfastened it from the winch line. Yet the board did not move. That court pointed out that respondent Hooks was working for Kerr-McGee *"in the substructure of the well site."* As we have shown in our Statement, the court below found from the evidence, when a lunch break was called "about 12:30 o'clock, appellee went to his automobile, got his lunch box * * *" and "* * * went to the tree and sat down underneath it in order to be in the shade when eating his lunch. The platform fell and struck appellee in the back * * *." (App. 1a-3a). Shade was provided by Hooks' automobile or by the substructure at the well site. He could have eaten his lunch at either place. Yet, he chose to crawl under the monkey board and in doing so it slid down the tree and struck him. Did this result from Hooks' choice? We say yes, because certainly petitioner could not have anticipated such an action.

The court below paid lip to service to the principle that, because the accident and injury occurred in Texas, the law of that State governed and, as that court understood the law of Texas, "it is the general rule that a licensor assumes no duty toward a licensee except to refrain from causing him injury by active negligence or wilful, wanton or reckless conduct," citing *Gonzalez* v. *Broussard* (Tex. Civ. App.) 274 S. W. 2d 737 (App. 4a).

The court below then erroneously held that respondent Hooks was a general invitee and was not a limited licensee insofar as the petitioner was concerned. It also upheld the action of the trial court in defining assumption of risk that respondent Hooks only assumed the risks of dangers actually *known* to him and refused to follow the controlling and contrary decision in Texas of *McKee* v. *Patterson,* 153 Tex. 517, 271 S.W. 2d 391 (App. 4a, 6a) and *Oaxaca* v. *Lowman,* (Dec. 1956), 297 S.W. 2d 729.

We submit that if the leaning of the monkey board against the tree created any dangerous condition, that condition was as obvious to respondent Hooks, an experienced roughneck who worked in oil fields, as it was to employees of petitioner. The courts below placed an impossible and unreasonable burden upon the petitioner because they held in instructing the jury that the jury could find, from the fact that the monkey board was leaned by petitioner's employees against a tree, negligence on the part of petitioner. On the other hand, if this were so, such danger would be open and obvious and should have been known by the respondent Hooks, an experienced oil field roughneck. Yet on this aspect of the case, the courts below refused to charge that if Hooks should have known of this dangerous condition, he could not recover, as re-

quired by the *McKee* case. There was no evidence that Hooks was invited by petitioner or his employer Kerr-McGee to crawl under the monkey board and eat his lunch there. As no invitation was given by any employee of petitioner or Kerr-McGee, we submit no such invitation could arise by any rule of law known to us, because Hooks had no business there.

In a factual situation almost identical with the facts involved in the case below, the plaintiff, who was injured as a result of a fall from a slick condition of a floor in an area where he was working was denied a recovery. The Supreme Court of Texas[3] in the leading case of *McKee* v. *Patterson,* 153 Tex. 517, 271 S.W. 2d 391 on the subject of open and obvious dangers, in very similar circumstances, held:

> "* * * the duty 'to exercise ordinary care to keep the premises in a reasonably safe condition' so that the invitee will not be injured * * * does not extend to those invitees who know *or should know* of the existence of the particular condition and who appreciate *or should appreciate its dangers* (citing many Texas cases) * * *.
>
> In determining liability, under the defense of voluntary exposure to risk, it is said that one cannot recover for injuries sustained while *voluntarily* exposing himself to a danger which he either does *or should fully realize and appreciate.* (Citing many Texas cases)." (Emphasis added)

In Texas an invitor is not an insurer of his premises with an unlimited duty to warn his invitee of dangers equally as obvious or apparent to him as to the invitor.

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[3] The Supreme Court of Texas is the highest court and the court of last resort in Texas.

*McElhenny* v. *Thielepape,* (S. C., Tex., 1956), 285 S. W. 2d 940; *Houston Nat. Bank* v. *Adair,* (S. C., Tex., 1948), 207 S. W. 2d 374. The Texas rule is stated thus by the Supreme Court of Texas in *Hall* v. *Medical Bldg. of Houston* (1952), 251 S.W. 2d 497:

> "The principle as generally stated is qualified by the rule that the owner or occupant of the premises does not owe to the business invitee the duty to protect him against dangerous conditions 'that are obvious, *reasonably apparent, or as well known to the person injured* as they are to the owner or occupant.' (Citing cases)" (Emphasis added).

Under the facts in the case below, respondent Hooks crawled under the monkey board on his volition without an invitation from anyone and for a personal reason of his own, that is, his personal comfort in eating his lunch. He could have obtained the shade he wanted by eating his lunch in his own automobile where he had left his lunch at the substructure at the well site. His crawling under the monkey board had no connection with his employment and, on the contrary, if the theory of the courts below is correct, that the leaning of the monkey board against the tree created a dangerous condition, was guilty of an act of negligence in voluntarily placing himself in a condition of open and obvious danger, which danger was as obvious to him as to anyone else working near the well site. In such circumstances, the Supreme Court of Texas has held that an owner or occupant of premises is not required to anticipate such an act of negligence and when such an act of negligence (similar to the one Hooks engaged in) occurs, there can be no recovery because "the owner or occupant of the premises does not owe

to a business invitee the duty to protect him against dangerous conditions that are obvious, reasonably apparent or as well known to the person injured as they are to the owner or occupant." *Hall* v. *Medical Bldg. of Houston,* supra; *Dewinne* v. *Allen* (1955) 277 S.W. 2d 95; *Mackey* v. *F. W. Woolworth Co.* (1953) 277 S.W. 2d 180; *McElhenny* v. *Thielepape* (1956) 285 S.W. 2d 940; *Otto* v. *Bobo* (1956) 287 S.W. 2d 274.

In the *Otto* case, the Court of Civil Appeals followed the case of *McKee* v. *Patterson,* supra, and held (p. 278):

> "The duty to keep premises safe for *invitees* applies only to defects or conditions which are in the nature of hidden dangers, traps, snares, pitfalls and the like in that they are not known to the invitee and *would not be observed by him in the exercise of ordinary care.* The invitee assumes all normal risks attendant upon the use of the premises and the owner or occupant is under no duty to reconstruct or alter the premises so as to obviate known and *obvious dangers nor is he liable for injury to the invitee resulting from a danger which was obvious or should have been observed in the exercise of reasonable care.*" (Emphasis added).

To the same effect are *Marshall* v. *San Jacinto Building,* 67 S.W. 2d 372; *Skillerns* v. *Paxton,* 293 S.W. 2d 521.

Even if we accept the argument of the courts below that respondent Hooks was not a licensee, which we contend he was, and treat him as an invitee, because he had work to do some 200 feet from the mesquite tree, the law of Texas precludes him from recovering because the danger which he charges the petitioner's employees with creating was open and obvious to him.

In such circumstances, he cannot recover. *McFerren* v. *Brae Burn County Club* (1955) 274 S.W. 2d 122. In the *McFerren* case, the Court of Civil Appeals held (p. 124):

> "In this Court, appellant supports his position as to the standard of care he claims was due him in this instance by the appellee, by citing the cause of *Carlisle* v. *J. Weingarten, Inc.*, 137 Tex. 220, 152 S.W. 2d 1073, 1074, and quoting this paragraph therefrom: 'It is settled by the law of this State that if the plaintiff was on the premises as an invitee, it was the defendant's duty to exercise ordinary care to keep its premises in a reasonably safe condition, so that the plaintiff would not be injured; and that if the defendant failed so to do, it would be liable for the damages proximately caused thereby. *Kallum* v. *Wheeler*, 129 Tex. 74, 101 S.W. 2d 225.'
>
> *"This Court, however, while recognizing the rule so set down in the Carlisle* v. *J. Weingarten, Inc. case, and further that, under the facts, appellant's status on the premises involved was that of an invitee, is constrained to further hold that the rule that is so expressed by the Supreme Court has no application to the undisputed record in this cause. This for the reason that it is also well established that an invitee, to recover damages resulting from a hidden danger, must prove the existence of such a danger, and that the owner, or occupant, of the premises involved, knew or ought to have known, of that particular danger."* (Emphasis added).

The actions of the courts below in refusing to direct a verdict for the petitioner and in refusing to instruct the jury that the respondent Hooks could not recover, if the jury found that he should have known that it was dangerous to sit under the monkey board

to eat his lunch, are in direct conflict with the law of Texas. All persons are entitled to equal justice under the law. If petitioner was negligent in placing the monkey board against the tree, then respondent Hooks, an experienced roughneck, must be held equally negligent in voluntarily sitting under it. We think ordinary principles of justice and Texas law require that the same rule be applied to both parties. A plaintiff under Texas law is not permitted to recover from a defendant when their actions are for all purposes identical. In other words, under the decisions of Texas, even though a defendant might be guilty of an act of negligence in creating a condition which might be termed dangerous, if another can or should observe that condition, and, nevertheless, puts himself in a position of open and obvious danger, that latter act is the proximate cause of the accident and not the original act of a defendant (like that of petitioner). Under Texas law, where a party places himself in a position of obvious danger, the original creation of the "dangerous" condition is remote and is not the proximate cause of the accident. *Phoenix Refining Co.* v. *Tips* (1935) 81 S.W. 2d 60; *Union Gas Co* v. *Madeley* (1932) 55 S.W. 2d 259; *Magnolia Petroleum Co.* v. *Cocke* (1928) 3 S.W. 2d 139, and see *Oaxaca* v. *Lowman* (decided December, 1956), 297 S.W. 2d 729.

Thus, to illustrate our contention, had respondent Hooks gone under the monkey board to answer a call of nature, under Texas law, he would have become a licensee and could not recover. Is going under the monkey board to eat lunch any less personal? We say no. *Jameyson* v. *Farmers Gin Co.-Operative Association,* 278 S.W. 2d 169. In the *Jameyson* case, plaintiff, who was an invitee to haul ash from defendant's premises, went near a burner, to answer a call of

nature, where he suffered injuries. Yet the Texas Court of Appeals held:

> "* * * When he turned aside from his inspection and walked toward the burner, he became a licensee * * *. The Gin Association extended no invitation to plaintiff to approach the entrance to the burner of the incinerator for a purely personal purpose. When plaintiff was injured, he was a licensee only. (Citing many cases)."

Hence, the courts below were in error, under Texas law, in applying the rule of ordinary care to petitioner's actions.

This error and the District Court's erroneous instructions on assumption of risk destroyed the Texas rule of proximate cause as construed in the *Phoenix Refining Co., United Gas Co.* and *Magnolia Oil Co.* cases, supra, and in *International-Great Northern R. Co.* v. *Lowry,* (1938) 121 S.W. 2d 585. In the latter case defendant's employee received serious injuries when he jumped from a moving train when defendant's conductor negligently failed to cause the engineer to stop the train at Gould where plaintiff had been ordered to perform work. In denying liability of the railroad to its employee, the Texas Court held:

> "In our opinion it clearly appears from the facts in evidence that the *injury suffered by defendant in error was not the natural and probably consequence of plaintiff in error's negligence and that it was not an injury that might reasonably have been anticipated.* Inconvenience to defendant in error and the loss of time on account of being carried beyond his destination, instead of physical injury, would have been the natural and probably consequences of the failure of the conductor to cause the train to stop. Defendant in error's jumping from the train moving at thirty-

five miles an hour was not reasonably to have been anticipated. He was not required or expected in the performance of his duties to board or alight from trains in motion. A person of ordinary prudence under the same circumstances, would have remained on the train and returned to Gould on another train. * * *"

The Texas Court continued:

"Defendant in error was not placed in a position of peril, either actual or apparent, by the negligence of plaintiff in error, but was in a safe position on the train until he elected to jump. * * *

"That defendant in error's act in jumping from the train was not reasonably foreseeable is made more certain by the fact, established by the evidence above mentioned, that *his injury was the result of his own independent and voluntary act for which there was no necessity.* * * *

"The chain was broken when the independent act of the defendant in error, *not within the reasonable contemplation of plaintiff in error, intervened to bring about the injury.* Under such state of facts the original or primary wrong is regarded a condition or a remote cause and the intervening act, the proximate cause or, as it is sometimes designated for want of a more accurate term, the *sole cause.* (Citing many cases.)" (Emphasis added).[4]

When the Texas law is applied here, only one reasonable conclusion can be reached, that the proximate

[4] Compare these facts with ours. Here respondent Hooks could have eaten his lunch in the shade of the well substructure, as all other employees did, in his automobile, or in the sun, as many employees in Texas do. Yet he crawled under the monkey board and obviously caused it to fall on his back. Do not the *McKee* and *International-Great Northern R. Co.* cases preclude a recovery? We say yes.

cause of respondent Hooks' injuries was his voluntarily, for his own convenience, crawling under the monkey board and causing it to fall upon his back. Proper application of the law of Texas required the entry of a directed verdict in favor of petitioner. So we say the Tenth Circuit reached a decision here "opposite" to Texas law which we discuss in detail later.

Since the courts below did not follow controlling Texas law, a typical situation is presented in which this Honorable Court in a number of cases granted certiorari in order to require the adherence by Federal courts to State laws governing local causes of action. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64; *Russell* v. *Todd,* 309 U. S. 280; *Wichita Royalty Co.* v. *City National Bank,* 306 U. S. 103. In other words, when a Federal court adjudicates civil rights arising in a state of the Union, the Federal court in effect should act as the court of the State. *Guaranty Trust Co.* v. *York,* 326 U. S. 9. Clearly the failure of the courts below to follow applicable and controlling Texas law violates many controlling decisions of this Court and the Rules of Decision Act, 28 U.S.C. Section 1652.

## II.

**The decision below and an earlier decision of the court below are "opposite" and in conflict with two decisions of the Fifth Circuit in construing the law of Texas.**

As we have pointed out earlier in this Petition, the court below here has refused to follow the law of Texas, particularly as announced in *McKee* v. *Patterson* (1954) 271 S.W. 2d 391. In an earlier decision,[5] the court below likewise refused to follow the principles of *McKee* v. *Patterson.* In other words, the court below has refused to apply that principle of

[5] *Swift & Co.* v. *Shuster,* 193 F. 2nd 615.

Texas law which is clearly enunciated in the *McKee* case and in the cases following it that a plaintiff cannot recover if the dangerous condition of which he complains *should have been known to him.* Not only has the court below refused to apply this principle of Texas law, but it refused to instruct the jury below in accordance with the Texas law announced in the *McKee* case. In this regard, we submit that the Fifth Circuit has correctly construed the law of Texas in the cases of *Bagby* v. *Barton,* 131 F. 2d 887 and *U. S. Gypsum Co.* v. *Balfanz,* 193 F. 2d 1.

Thus, contrary to the decision of the court below, the Fifth Circuit in the *Bagby* case held that in determining whether a person was an invitee or in the absence of an express invitation a licensee, this question would turn on the principle of whether an invitation could be inferred because of a common interest or mutual advantage, and in such circumstances, a person could be an invitee. Thus the Court of Appeals for the Fifth Circuit held, where a person's object on the premises is pleasure or is for the benefit of the person using it, then that person becomes a licensee under Texas law. Further, in construing Texas law, that Court of Appeals held, even though a person is not wrongfully upon a premises, if he uses the premises for his own personal use and in a manner not contemplated by the owner, that he becomes a mere licensee, which means that the owner of the premises or the user of the premises owes to that person the duty to abstain from wilful injury only.

In the *U. S. Gypsum Co.* case, supra, the facts were very similar to the facts involved in the case below, and were as follows: A building contractor fell into an open air duct or tunnel in a heater room. It was

claimed by the plaintiff, while on his way to talk to two of his men who were working in one of the large tubes, that he fell into the open end of the tunnel, which defendant had negligently left open, unguarded and unlighted. It was further claimed the defendant negligently removed a barricade that the plaintiff had erected to prevent workmen from falling into the tunnel. The district judge refused to direct a verdict for defendant and submitted the case to the jury, among other things, on the question of the defendant's negligence. The plaintiff recovered a verdict. The Court of Appeals for the Fifth Circuit pointed out that the defendant's primary point in the case was, while the plaintiff was an invitee to the premises, he was not an invitee of the defendant concerning plaintiff's use of the dark and dangerous passageway, because plaintiff had *or should have knowledge of its existence* (p. 3). The Court of Appeals agreed with plaintiff's primary contention, reversed the case and ordered that the verdict and judgment of the District Court be reversed and a judgment entered for the defendant (p. 4), ruling (p. 4):

> "As applied to the undisputed facts of this case, the law is simple and plain, and we are in no doubt that a verdict for defendant should have been directed. While it is clear that plaintiff was an invitee on those portions of the premises of defendant where he had business to be, and defendant, as to such places, owed him the duty of due care, including the duty to warn him and protect him against latent or concealed perils, *it did not owe him the duty to warn him of conditions known to him, or in respect of places and situations where he had no reason to be, and where it had no reason to anticipate he would be.*

"In addition, the undisputed evidence establishes as a matter of law that plaintiff's own negligence was the sole proximate cause of his injury. It is a cardinal rule of law that 'a person is required to make reasonable use of his faculties of sight, hearing, and intelligence to discover dangers and conditions of danger to which he is or might become exposed, *and one injured as a result of his failure to use his faculties to observe and discover a danger which would have been observed and discovered by an ordinarily prudent person is guilty of contributory negligence.*'" (Emphasis added).

Persons versed in Texas law recognize that the decisions of the Tenth Circuit are in "sharp conflict" with Texas law controlling injuries from open and obvious conditions. This is well illustrated by the Dean and a Professor of Law of the University of Texas, W. Page Keeton, in his learned article entitled, "Personal Injuries Resulting from Open and Obvious Conditions—Special Issue Submission in Texas," Volume 33, Texas Law Review, No. 1, pp. 1-23. Dean Keeton points out (p. 1) that the controlling case in Texas on the question of injuries resulting from open and obvious conditions is *McKee* v. *Patterson,* 271 S.W. 2d 391, which "held that the duty of an occupier * * * who was in possession and control of premises, does not extend to those *invitees*[6] who know *or should know of the existence of the particular condition* and who appreciate *or should appreciate its dangers.*" Concerning the failure of the Tenth Circuit to follow the *McKee* case, Dean Keeton tersely writes (p. 2):

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[6] Note that this rule is applied to *invitees.* We submit Hooks lost his standing as an invitee when he crawled under the board leaning against the tree for his personal wishes without any actual or implied invitation.

> "The shart conflict which has developed in this type of case is illustrated by *Swift & Co.* v. *Shuster,* (192 F. 2d 615), a decision of the United States Court of Appeals for the Tenth Circuit, *where the court reached the opposite* result in a similar situation, one judge dissenting." (Emphasis added).

There is a pressing need that this Court resolve this conflict, based on the original majority vote of only *one* judge, in order to insure to litigants whose cases arise under Texas law in the Tenth Circuit, that they receive a fair trial and have their civil actions arising under Texas law adjudicated in accordance with that law as required by the decisions of this Honorable Court and by Congress. (28 U.S.C., Section 1652) The time is ripe, and overripe, for the elimination of the confusion caused litigants of civil cases arising under Texas law due to the flat refusal of the Tenth Circuit to apply Texas law to actions arising in Texas.

## CONCLUSION AND PRAYER

Wherefore, your petitioner concludes and prays that this Honorable Court grant a Writ of Certiorari and bring before this Court for review and correction the decision and judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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February, 1957

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## APPENDIX

### Opinion

(November 26, 1956)

*Clyde J. Watts* and *Howard Barker* (*Looney, Watts, Looney, Welch, Hamill & Nichols,* and *Cantey, Hanger, Johnson, Scarborough & Gooch* were with them on the brief) for Appellant.

*James E. Grigsby* (*Howard C. Triggs* was with him on the brief) for Appellee Marshall W. Hooks.

*Howard Davis* and *Robert S. Kerr, Jr.,* (*Kerr, Conn & Davis* were with them on the brief) for Appellee American Motorists Insurance Company.

Before BRATTON, *Chief Judge,* and PHILLIPS and LEWIS, *Circuit Judges.*

BRATTON, Chief Judge.

Marshall W. Hooks instituted this action against E. L. Farmer & Company, a corporation, to recover damages for physical injury, together with expenses incurred and to be incurred for medical and nursing care. The substance of the cause of action pleaded in the complaint was that Kerr-McGee Oil Industries, Inc., hereinafter referred to as Kerr-McGee, was engaged in rigging up a drilling rig preparatory to the drilling of a well for oil and gas on a location in Texas; that in connection therewith defendant unloaded from trucks at the location of the well certain drilling equipment and material, including a steel platform known as a "monkey board", that the defendant negligently and carelessly leaned the platform against a small tree near the well site; that plaintiff was employed by Kerr-McGee and was engaged with other employees in rigging up the drilling rig; that plaintiff sat on the ground under the tree against which the platform was leaning in order to be in the shade while eating his lunch; and that the platform fell upon him and caused him serious and

permanent injury. American Motorists Insurance Company, the insurance carrier of Kerr-McGee, intervened to recoup compensation payments made to plaintiff.

The evidence adduced upon the trial tended to establish these facts and circumstances. Kerr-McGee owned or controlled as lessee the premises at which the accident and resulting injury occurred and it was preparing to drill thereon a well for the production of oil and gas. Through use of a bulldozer, an area approximately 150 feet square had been cleared of mesquite. A paved road extending north and south was located east of the cleared area and motor vehicles entered the area from the road. By means of trucks, B. L. Beakley transported to the location the equipment and material to be used in rigging up the drilling rig. The trucks were stopped in the northeast portion of the cleared area. Pursuant to contractual arrangement with Kerr-McGee, appellant was employed to unload the equipment and material at that place in the cleared area and to move it into position as it became needed in the assembling of the rig. A tree 12 or 15 feet in height was located east or slightly north of east of the well site on the cleared area. The distance of the tree from the well site was variously estimated at 100 to 200 feet. Sometime around 8:30 to 9:30 o'clock on the day of the accident, employees of appellant, in the course of their employment and through use of a truck equipped with a gin pole and winch line, unloaded the steel platform to which reference has been made and leaned it against the tree. The platform was approximately 8 by 10 feet in size, and its weight was estimated at from 400 to 1600 pounds. The long side of the platform rested on the ground. It was positioned at an angle of about 45 degrees, and it rested against the tree approximately 2 feet off center. When the platform was placed in that position, an employee of appellant weighing from 180 to 190 pounds jumped upon it and unfastened it from the winch line. The ground at that point was smooth and of caliche formation. It was the intention of the employees

of appellant to let the platform remain in that position until the next day when it would be moved into its position at the derrick. It was the established custom and practice among those engaging in assembling and rigging up drilling rigs to lay the steel platform on the ground until it was placed in its position at the derrick. The reason the employees of appellant left this particular platform in a leaning position rather than laying it on the ground was that it could be more easily or conveniently picked up when needed in the assembling of the derrick. Twenty-two men were working at the location, 15 being employees of Kerr-McGee and 7 employees of appellant. Appellee began working for Kerr-McGee that morning as a roughneck and he was participating in the work at the substructure of the well site. About 12:30 o'clock, the employees of Kerr-McGee were told that it was time for lunch. An automobile belonging to appellee was standing slightly south of east from the tree, and a water can containing drinking water was located about 25 feet southwest of the tree. Appellee went to his automobile, got his lunchbox, and started for the water can but did not get any water for the reason that time was short and several men were ahead of him. He then went to the tree and sat down underneath it in order to be in the shade while eating his lunch. The platform fell and struck appellee in the back and he was seriously and permanently injured. The court submitted to the jury the questions of negligence, proximate cause, contributory negligence, assumption of risk, and unavoidable accident. The jury returned a verdict for plaintiff; judgment was entered upon the verdict; and defendant appealed.

The first ground of attack upon the judgment is that since appellant owed no duty to furnish appellee a place at which to eat his lunch, he was a mere licensee and appellant could not be liable for his injury. The substance of the argument in support of the contention is that in respect to the place on the premises at which the platform

was leaned against the tree, appellee was a mere licensee; that appellant owed him only the duty to refrain from active negligence or wilful injury; that the evidence showed conclusively that appellant did not demonstrate wilful, wanton, or reckless conduct toward appellee in placing the platform against the tree; and that therefore the judgment should be reversed and the cause remanded with directions to dismiss the action. The accident and resulting injury having occurred in Texas, the law of that state governs herein respecting the rights, duties, and obligations of the parties, and the liability, if any, of appellant. And as we understand the law of Texas, it is the general rule that a licensor assumes no duty toward a licensee except to refrain from causing him injury by active negligence or wilful, wanton, or reckless conduct. Gonzalez v. Broussard, (Tex. Civ. App.), 274 S.W.(2d) 737. But here both appellant and appellee were on the premises as invitees of Kerr-McGee. Appellee was not there pursuant to direction, consent, or other permissive grant of appellant. There was no relationship of licensor and licensee between them in respect to the occupancy of the premises. And there was nothing in the relationship between them which operated to narrow or limit to any extent the duty resting upon appellant to exercise reasonable care under the circumstances for the safety of appellee while they were on the premises of their common employer in connection with the discharge of their respective duties. St. Louis Expanded Metal Fireproofing Co. v. Dawson, (Tex. Civ. App.), 70 S.W. 450; Snelling v. Harper, (Tex. Civ. App.), 137 S.W.(2d) 222; Larson v. Tri-City Electric Service Co., 132 F.(2d) 693; Constantino v. Watson Contracting Co., 219 N.Y. 443, 114 N.E. 802; Samuel E. Pentecost Const. Co. v. O'Donnell, 112 Ind. App. 47, 39 N.E.(2d) 812; Fidelity & Casualty Co. v. Llewellyn Iron Works, 42 Cal. App. 766, 184 Pac. 402.

The judgment is challenged on the further ground that under the uncontroverted evidence appellee was guilty of contributory negligence. It is conceded that the charge

given was a correct statement of the law of contributory negligence. But it is said that if appellant be held negligent in leaning the platform against the tree, appellee was negligent in sitting under the tree, or even near the platform; that any negligence on the part of appellant furnished only a remote condition for the accident; and that therefore the court should have directed a verdict for appellant. It is the well established rule of law in Texas that ordinarily the question of contributory negligence is by reason of the very nature of the defense one of fact for the jury, and that it becomes a matter of law for the court only when but one reasonable conclusion can be drawn from all the testimony. City of Fort Worth v. Lee, 143 Tex. 551, 186 S.W.(2d) 954; Texas & Pacific Railway Co. v. Day, 145 Tex. 277, 197 S.W.(2d) 332; Lang v. Henderson, 147 Tex. 353; 215 S.W.(2d) 585. It is the further rule in that state that the mere fact that a person may expose himself to a danger does not necessarily preclude recovery; and that even where a person has actual or imputed knowledge of danger, a question of fact as to negligence is presented unless it can be said as a matter of law that a person of ordinary care would not have incurred the risk. Gulf, Colorado & Santa Fe Railway Co. v. Gascamp, 69 Tex. 545, 7 S.W. 227; McAfee v. Travis Gas Corp., 137 Tex. 314, 153 S.W.(2d) 442. When all of the facts and circumstances in this case are viewed in the light of these guiding principles, we are unable to say that as a matter of law appellant was guilty of such contributory negligence as to bar recovery.

Complaint is made respecting the instruction given to the jury relating to assumption of risk. The substance of the instruction was that if appellee knew that a dangerous condition existed due to the manner in which the platform was resting against the tree, and with knowledge of such apparent danger voluntarily placed himself in a position of peril and as a consequence was injured, he could not recover; but that if he was not apprised of the dangerous

condition or the presence of hazard, he could not be deemed to have assumed the risk by sitting under the tree. The trend of the argument is that the defensive rule of assumption of risk includes risks actually known to plaintiff and those which should be known through the exercise of ordinary care; that any danger inhering in the leaning position of the platform was apparent and was known or should have been known in the exercise of ordinary care; and that by voluntarily sitting under the tree, appellee inevitably assumed the risk as a matter of law. In Triangle Motors of Dallas v. Richmond, 152 Tex. 354, 258 S.W.(2d) 60, the contention was categorically presented that the dangers complained of were open and obvious; that plaintiff had opportunity equal with that of defendant to know of such dangers; and that therefore the rule of assumed risk precluded recovery on the part of plaintiff as a matter of law. And the contention thus categorically presented was squarely decided, the court holding in language too clear for doubt that the right of plaintiff to recover cannot be defeated on the theory that he assumed the risk of injury unless it appears that with full knowledge of the nature and extent of the danger involved, he put himself in the way of the particular risk involved as the result of a deliberate choice. And that general rule was expressly repeated in the later case of Page v. Scaramozi, (Tex. Civ. App.), 288 S.W.(2d) 909. The case of McKee v. Patterson, 153 Tex. 517, 271 S.W.(2d) 391, upon which appellant relies is distinguishable. Without citing or referring to Triangle Motors of Dallas v. Richmond, supra, the court there said in general language that the duty to exercise ordinary care to keep premises in a reasonably safe condition does not extend to invitees who know or should know of the existence of the particular condition and who appreciate or should appreciate its dangers. And the court further said that if, having knowledge of the dangers, an invitee exposes himself to them he must take the premises as he finds them and there is no duty upon the owner to protect

him even by the use of reasonable precautions to eliminate the hazard. But in that case it was crystal clear from the testimony of plaintiff himself that he actually knew of the slick condition of the floor which caused the fall and resulting injury and fully appreciated the danger of working on it. The case did not turn in whole or in part upon the question whether the reach of the doctrine of assumed risk includes one who does not actually know of the danger but in the exercise of ordinary care should know of it. Another case upon which appellant places strong reliance is Phillips Petroleum Co. v. Gibson, 232 F.(2d) 13. There plaintiff sued in the United States Court for the Western District of Texas. The trial court submitted to the jury the question of assumed risk. Plaintiff recovered. Citing McKee v. Patterson, supra, and resting its conclusion in part upon the assumption of an apparent risk which in the exercise of ordinary care plaintiff should have known, the Court of Appeals reversed the judgment of the District Court and rendered judgment for the defendant. And on certiorari, the judgment of the Court of Appeals was vacated and that of the District Court was reinstated. Gibson v. Phillips Petroleum Co., — U.S. —. Paraphrasing somewhat the language of the court in Triangle Motors of Dallas v. Richmond, supra, we think it is fairly apparent that under the law of Texas the right of appellee to recover herein cannot be defeated on the theory that in the exercise of ordinary care he should have known of the danger inhering in the leaning position of the platform; and that he deliberately put himself in the way of the particular risk as the result of a deliberate choice.

Error is predicated upon the admission of testimony given by an expert witness. The witness was a geologist and reservoir engineer. His studies of physical sciences included the laws of physics, mathematics, chemistry, geometry, and analytic geometry; and he had made a study of stresses, strains, leaning objects, and falling objects. His testimony related in the main to the rotation of the

platform when it slipped down the tree. And he was permitted at one juncture to state that one might sit at what seemed a safe distance from the platform and still be hit as it fell. Expert testimony is appropriate when the subject of inquiry is one which jurors of normal experience and qualification would not be able to decide on a solid basis without the technical assistance of one having unusual knowledge of the subject by reason of skill, experience, or education in that particular field; the determination of the admissibility of expert testimony rests largely in the discretion of the trial court; and when exercised within normal limits, such discretion will not be disturbed on appeal. Brigham Young University v. Lillywhite, 118 F.(2d) 836, certiorari denied, 314 U.S. 638, 137 A.L.R. 598; Schillie v. Atchison, Topeka & Santa Fe Railway Co., 222 F.(2d) 810. It is enough to say without laboring the question that we think there was no abuse of discretion in admitting the testimony in question.

One ground of the motion for new trial was that the verdict of the jury was a quotient verdict. Two affidavits were attached to the motion for new trial. One was made by a claims representative working with the attorneys for appellant in the trial and the other was made by one of the attorneys for appellant. From such affidavits, considered together, it appeared that within a few minutes after the return of the verdict the claims representative went into the jury room and picked up certain work sheets and scraps of paper, some of which were in waste baskets; that the claims representative delivered all of such work sheets and scraps of paper to the attorney; that the attorney delivered them to the clerk of the court; and that adding together twelve sets of figures appearing on such sheets or scraps of paper and dividing the total by twelve results in a quotient of $114,295, the amount of the verdict. Based upon considerations of sound public policy, it is the well established rule that ordinarily jurors in the United States Court will not be heard to give testimony, either

oral or by affidavit, for the purpose of impeaching the verdict returned where the facts sought to be shown are such that they essentially inhere in the verdict. Hyde v. United States, 225 U.S. 347, McDonald v. Pless, 238 U.S. 264; Clark v. United States, 289 U.S. 1; Stein v. New York, 346 U.S. 156; Johnson v. Hunter, 144 F.(2d) 565; Loney v. United States, 151 F.(2d) 1; Young v. United States, 163 F.(2d) 187, certiorari denied, 332 U.S. 770, 334 U.S. 839; Western Spring Service Co. v. Andrew, 229 F.(2d) 413; Northern Pacific Railway Co. v. Mely, 219 F.(2d) 199; Armstrong v. United States, 228 F.(2d) 764, certiorari denied, 351 U.S. 918.

Appellant does not rely upon the testimony or affidavits of members of the jury to impeach the verdict on the ground that it was reached through the quotient method. Appellant relies upon the so-called work sheets and scraps of paper with figures made thereon by members of the jury in the course of their deliberations. There is no present need to explore the question whether evidence of that kind falls into the inadmissible class along with testimony or affidavits of jurors. Assuming, without so deciding, that the evidence was admissible, standing alone it was not sufficient to impeach the verdict. It is essential that some feasible means be employed as a method of reaching a figure upon which all members of the jury agree as just and reasonable compensation. One of the methods sometimes used by jurors for bringing themselves together in respect to amount is the process of addition and division. And to add the several sums which the several jurors respectively think should be awarded plaintiff and divide the total by twelve does not render a verdict provided that after the mathematical computation has been made and the quotient is known each juror for himself agrees severally and collectively that the sum reached in that manner shall be carried forward into the verdict. The vice which renders a verdict subject to impeachment on the ground of being a quotient verdict is an agreement in advance

to accept the amount as the verdict, without subsequent consideration. Page v. Lockley, 176 S.W. (2d) 991, reversed on other grounds, 180 S.W. (2d) 616; Hamilton v. Atchison, Topeka, & Santa Fe Railway Co., 148 Pac. 648; Talley v. Grecar, 275 Pac. 378; Will v. Southern Pacific Co., 116 Pac. (2d) 44; Ehalt v. McCarthy, 138 Pac. (2d) 639; Board of Commissioners v. Gardner, 260 Pac. (2d) 682. There was no showing in this case that the jurors entered into an agreement in advance that the quotient reached—whatever the amount—should be the verdict without subsequent consideration. So far as the record discloses, the jurors may have agreed each for himself after the addition and division had been completed that the quotient thus reached should be his verdict. Therefore, the showing made was not enough to warrant impeachment of the verdict on the ground that it was a quotient verdict.

Another ground of the motion for new trial was excessiveness of the verdict. It is argued that the verdict is excessive and obviously the result of passion and prejudice. The question whether a verdict is excessive and is the result of passion and prejudice is one for the trial court to determine on motion for new trial. The action of the court in granting or denying a motion for new trial on that ground is not open to review on appeal except for abuse of discretion. And ordinarily it will not be held on appeal that the trial court abused its discretion in denying a motion for a new trial on such grounds unless it affirmatively appears that in respect to amount the verdict resulted from bias, prejudice, or passion. Chicago, Rock Island & Pacific Railway Co. v. Kifer, 216 F.(2d) 753, certiorari denied, 348 U.S. 917. This case was carefully and painstakingly tried on a high level and the record is completely barren of any persuasive indication of appeal to passion or prejudice. We fail to find in the record any basis for the conclusion that the court abused its discretion in denying the motion for new trial on the ground of excessiveness of the verdict.

The Judgment is Affirmed.

**Judgment**

Tenth Day, November Term, Monday, November 26th, 1956.

Before Honorable Sam G. Bratton, Chief Judge, and Honorable Orie L. Phillips and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

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**Order Denying Appellant's Petition for Rehearing**

Thirty-first day, November Term, Monday December 31st, 1956.

Before Honorable Sam G. Bratton, Chief Judge, and Honorable Orie L. Phillips and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

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[By order of January 12th, 1957, the mandate of the United States Court of Appeals was stayed for a period of thirty days from that date under provision of paragraph 3 of rule 28.]